



MEMO

**To : EXECUTIVE COMMITTEE
GLENN E. STEVENS, CHAIR
VICTORIA RUSNAK, MEMBER**

Date: May 8, 2014

**From : WILLIAM G. BRENNAN
ROBIN PARKER**

**Subject: UPDATE CONCERNING THE BOARD'S COMPLIANCE WITH THE 1996
PERFORMANCE AUDIT CONDUCTED BY BUSINESS, TRANSPORTATION
& HOUSING AGENCY, AND THE RESULTANT CORRECTIVE ACTION PLAN**

The legal staff¹ annually reviews the Board's compliance with the 1996 Performance Audit conducted by Business, Transportation & Housing Agency² ("Agency") and the resulting Corrective Action Plan. At the May 26, 2011, General Meeting, the members made this an exception report. Since it has been several years since the members reviewed the Audit, this matter is being agendized for informational purposes at the July 15, 2014, General meeting.

The enclosed updated matrix provides an overview of each audit finding, the chronology of each step taken toward Board compliance, and the Department of Motor Vehicles ("DMV") responses thereto. It further encompasses the Corrective Action Plan Committee's proposal that was adopted by the Board at its December 8, 1998, General meeting, and the Audit Review Committee's recommendations concerning restructuring the senior management positions which were adopted at the May 25, 2000, General meeting.

The following provides a brief summary of the Audit Findings and updates the corrective action taken by the Board:

1. The Board does not have statutory authority or budgeted resources to establish a "Lemon Law" consumer protection legal services program.

The Board has continued to enhance and improve the services offered by its Consumer Mediation Services Program without exceeding the guidelines established by the Corrective Action Plan Committee. It improved the complaint form which has been renamed the Mediation Request Form, which is available on the Board's website or by calling the Board's offices. The staff will continue informal mediation and direct

¹ At the November 20, 2008, General Meeting, the Audit Compliance Officer duties were assigned to the General Counsel, however, given the General Counsel's resignation, Robin Parker assumed this duty.

² Effective July 1, 2013, California State Transportation Agency superseded Business, Transportation & Housing Agency.

consumers to the Lemon-Aid pamphlet on the Department of Consumer Affairs website. Specific “Lemon Law” complaints are referred to the Department of Consumer Affairs. The Board adopted the use of a Mediation Checklist for Recreational Vehicle Jurisdiction when dealing with complaints from the public regarding RVs. The members are provided an annual update on the Consumer Mediation Program at a noticed meeting in January.

2. Duty Statements of the principal administrative officials are not in conformance with the provisions of the “new” Administrative Procedure Act.

At the May 25, 2000, General meeting, the members adopted the Corrective Action Plan Committee’s recommendation that the Board’s organization structure and duties of the Executive Secretary and Assistant Executive Secretary be redefined to eliminate all duties related to hearing Board cases. The Executive Secretary position was recast as the Board’s Executive Director and Tom Novi was appointed to this position on December 12, 2000, until he retired in 2005. The Executive Director is responsible for all administrative and statutory functions of the Board. The Assistant Executive Secretary duties were changed to that of General Counsel, eliminating all involvement in hearing specific cases. Howard Weinberg was appointed to the position of General Counsel on January 8, 2002. Mr. Weinberg resigned in February 2010. The Office of the Attorney General is serving in this capacity on an as needed basis. On September 8, 2005, the Board appointed William G. Brennan to the position of Executive Director.

In 2003, the Board sponsored legislation (Assembly Bill 1718, Chaptered September 22, 2003) that changed references to “Executive Director” from “secretary” to reflect the current organizational structure and duties of the Board staff and administration. Vehicle Code section 3014 was amended to remove any reference to Assistant Executive Secretary and changed the Executive Director position from a civil service to an exempt position. These statutes were effective on January 1, 2004. The Board promulgated regulations to reflect these changes that were effective on January 1, 2004. The Board also promulgated a regulation that deleted the authority of the Executive Director to conduct protest hearings (operative April 23, 2006).

3. The Board may not provide all due process protections of the “new” Administrative Procedure Act.

On September 23, 1998, Tom Flesh, Fritz Hitchcock, and Robin Parker met with then DMV Director, Sally Reed, Marilyn Schaff, then Chief Counsel, and Madeline Rule, then Assistant Chief Counsel, concerning the Board’s compliance with the Administrative Procedure Act (“APA”). Based upon Departmental input, the Corrective Action Plan Committee determined that the Board was in compliance with the “new” APA. The legal staff annually reviews the legislative changes to the APA to ensure Board procedures are in compliance, and provides a staff analysis to the Board Members and the Administrative Law Judges. This was last completed at the April 9, 2014, General meeting.

4. The Board staff did not seek prior approval for filing amicus curiae briefs with the courts.

A formal policy pertaining to the filing of amicus curiae briefs was developed and approved at the July 12, 1996, General meeting. In essence, the policy provides that the Board will not file any amicus curiae briefs without the consent of Agency. As a prerequisite to requesting the consent of Agency,³ the Board must (a) discuss and approve the consent request at a noticed public meeting, or (b) in the case where time constraints do not permit the foregoing, the President of the Board may authorize the request for consent. If the Board decides at a subsequent meeting not to file the amicus brief, the request for consent will be withdrawn. On March 9, 2011, the Board filed an amicus curiae letter in support of Yamaha's petition for review in the California Supreme Court in *Powerhouse Motorsports Group, Inc. and Timothy L. Pilg v. Yamaha Motor Corp, Inc.; Powerhouse Motorsports, Petitioner v. New Motor Vehicle Board, Respondent; Yamaha Motor Corp, Inc., Real Party in Interest*. In compliance with this policy, the necessary approvals from the Board Vice President, the Public Members (since this matter involves a dispute between a franchisee and franchisor), Agency, and the Governor's Office were received. It was reported to the full Board at its March 29, 2011, General Meeting.

5. The New Motor Vehicle Board does not comply with established policy and law pertaining to legal representation.

On March 18, 1997, the Board revised its Board Policy Regarding Representation in Court Actions. The Board has an established policy whereby all pending court matters are reviewed by the Board President or a Board Member designated by the President, for the determination of whether an important State interest/issue is implicated and whether it will participate in the litigation via the Attorney General's Office, or with the consent of the Attorney General, by the Board's own counsel.

Discussion of a Board Designee by the President consistent with this policy was considered at the June 26, 2008, General Meeting. As a result the Board decided that it is only those matters in which the Dealer Member would be disqualified from having heard in the first place that are being delegated. Further, if a Dealer Member is Board President, and a Public Member is Vice President, then the delegation should automatically go to the Vice President.

Unless an important State interest/issue is implicated, the Board notifies the parties of its policy not to appear in mandamus actions, and further requests that the parties notify the court and keep it on the proof of service list. If a court requests the Board's participation, the Board would not file any pleadings in the court action which would obviate the necessity of involvement by the Office of the Attorney General. If an important State issue is raised, prior to the Board participation, the matter would be presented to the full Board for review at a regularly scheduled Board Meeting. In the absence of sufficient time for consideration at a noticed Board Meeting, the President, or

³ Agency is not the final decision maker for the filing of amicus briefs, rather after Agency review, the filing such briefs must be approved by the Governor's Office of Legal Affairs.

a Board member designated by the President, can authorize the filing of appropriate pleadings. If this occurs, a copy of the petition and supporting documents are mailed to each member with an indication that the President, or his designee, has authorized Board participation. Any member who objects to Board participation would then immediately notify the staff and the matter would be scheduled for discussion at either the next General Meeting or, if three Public Members request, then at a Special Board Meeting.

The above policy would apply to ex parte hearings for a stay of the Board's order, as well as law and motion proceedings in which a stay order is sought. All judicial matters are monitored by the Board legal staff whether it is represented or not, and the status of each case is reported on the Executive Director's Report at each General Board meeting.

6. The amount of time devoted to hearing cases may be insufficient to allow for full consideration of all issues.

The Board continues to place a high level of importance on making materials available to Board members and allowing sufficient time to discuss issues at noticed meetings. The staff provides a website link to the Board meeting materials to all members and upon request mails a binder that is tabbed according to the agenda at least 10 days in advance of an upcoming meeting. In general, committee memorandums are disseminated to the appropriate members and courtesy copied to the Board President in advance of the materials mailing. Feedback is solicited from the committee members prior to finalizing the memo for dissemination to the full Board.

7. The Board should adopt parliamentary procedures.

At its March 18, 1997, General Meeting, the members adopted Board Parliamentary Procedures. On October 14, 1998, Robin Parker met with Madeline Rule, then Assistant Chief Counsel, DMV. Ms. Rule indicated that the Parliamentary Rules overlapped with other statutes and dealt primarily with internal Board procedures. The Parliamentary Rules did not require to be promulgated as rulemaking. At the January 8, 2003, General meeting, the Parliamentary Procedures were modified to reflect changes in the Board's organizational structure. At the May 26, 2011, General Meeting, the Parliamentary Procedures were amended to accurately reflect the current practice concerning debate and voting. In the event the Parliamentary Rules require further modification, this would be agendaized for all Board members to consider.

8. Board may not always be in compliance with the Bagley-Keene Open Meeting Act.

In 1996, the auditors found during discussions with Board members that some were unfamiliar with the technical requirements of the Bagley-Keene Open Meeting Act. For instance, some members misinterpreted the prohibitions against "serial meetings" and other requirements controlling informal communications between Board members. The Board's General Counsel has been designated the Bagley-Keene Open Meeting Act Compliance Officer and is responsible for ensuring compliance with the Act in addition to

providing guidance, legal opinion, and education to the members and staff. The Board members have all been provided with educational materials pertaining to the Bagley-Keene Open Meeting Act, including the website reference for A Handy Guide to the Bagley-Keene Open Meeting Act of 2004 published by the Attorney General's office. The members are provided an annual update of the Open Meeting Act and a brief staff analysis. Continuous education on this topic is provided to the members and has been a noticed agenda item on many occasions. This was last completed at the April 9, 2014, General meeting.

9. The Department and the Board should develop an issue memo for reorganization.

After the Corrective Action Plan Committee reviewed the option of referring all matters to the Office of Administrative Hearings, it determined that the present system as modified with several proposed recommendations would be more efficient, cost effective, and would afford the parties an effective means to resolve disputes. At its May 25, 2000, General meeting, the members adopted the Audit Review Committee's recommendation that Board cases continue to be heard by the Board's Administrative Law Judges. All of the Committee's recommendations as adopted by the Board have been implemented. See Audit Finding 2 for a further discussion concerning the Board's reorganization of its senior management positions.

10. The Board should consider referring its consumer inquiries to departments with primary jurisdiction and adequate resources.

The Board, in compliance with this Audit Finding, does refer all consumer inquiries to departments with primary jurisdiction. For example, "Lemon Law" complaints are referred to the Department of Consumer Affairs, complaints concerning used vehicle dealers are referred to DMV Investigations, and complaints concerning auto repair facilities that are not also new motor vehicle dealers are referred to the Bureau of Automotive Repair. However, staff in the Consumer Mediation Services Program processes consumers' requests for mediation of disputes with new vehicle dealers and manufacturers. In May 2011, an inter-agency memo was sent to agencies the Board refers to and those that refer to the Board to reinforce the Board's jurisdiction and services offered by the Consumer Mediation Program. In March 2014, letters similar to those sent out in 2011 were again mailed to government and private agencies to reinforce the Board's jurisdiction and services offered by its Mediation Program.

11. The Board does not have a new member introduction program.

At its July 18, 2000, General meeting, the members adopted a report from the Board Development Committee which recommended new member orientation and a Board member education program for new and existing members. The new member orientation program is used for all new Board members. Board member education is scheduled for most, if not all, Board meetings. Annually, a schedule of educational speakers and industry related tours are developed and implemented. Most recently, this occurred at the November 13, 2013, General Meeting.

12. The Board should review its case management quality assurance system.

In mid 2002, the Board installed a relational database for the Legal Division. Cases are managed by the Board counsel through a calendaring system. Efforts to improve the management of Board cases via software are regularly reviewed internally and tested for compatibility. DMV monitors all acquisitions in this regard and also provides testing services.

The Policy and Procedure Committee, along with input from legal counsel for dealers and manufacturers, also recommended the following revisions to the Board case management procedures which were adopted by the members at the April 27, 2001, General meeting:

- In an effort to ensure the expeditious management of protests and petitions, staff will refer, as necessary, a specific matter to the appropriate Administrative Law Judge ("ALJ") for review, and/or staff will report the status of the case to the Board as an agenda item at a scheduled Board meeting to allow for Board action and the opportunity for the parties to appear and comment.
- In an effort to ensure that protest matters proceed to hearing within the statutorily mandated time frame, the Board staff is directed to adhere to the mandates of Vehicle Code section 3066, which provides that hearings may not be postponed beyond 90 days from the Board's original order setting the hearing date, and Title 13 of the California Code of Regulations section 592 which provides that hearings may not be continued within 10 days of the date for hearing except in extreme emergencies. Any request for a continuance that would violate the above-referenced sections or when it appears that it would be beneficial to the expeditious management of the case will be referred to the assigned "merits" ALJ for review. Petition matters that do not proceed to hearing within a reasonable period of time will also be referred to the assigned "merits" ALJ for review.

The above revisions did not require statutory or regulatory changes.

In March 2002, the Board adopted a proposal to undertake a comprehensive review and analysis of its enabling statutes and regulations. Input was solicited from the Board Administrative Law Judges and legal staff, attorneys that regularly practice before the Board, industry personnel, and Board members. As a result of the review, the following changes were approved at the September 10, 2002, and October 29, 2002, General meetings:

- Promulgate a regulation that gives the Board explicit authority to dismiss protests.
- Promulgate a regulation that allows the Board to waive the annual fee for a new motor vehicle distributor or manufacturer who either does not sell vehicles in California or does not have an independent dealership in California.

- Promulgate a regulation that formalizes the procedure for litigants to make motions for change in venue and provides for Board recovery of travel and hearing facilities costs when the party requesting the change cancels the proceeding at the new venue.
- Sponsor non-substantive legislation that changes references to “executive director” from “secretary” and to “administrative law judge” from “hearing officer” to reflect the current organizational structure and duties of the Board staff and administration. In January 2004, Vehicle Code section 3014 was amended to remove any reference to Assistant Executive Secretary and changed the Executive Director position from a civil service to an exempt position. Additionally, Vehicle Code section 3066 was amended to reference Government Code section 11511.5 that gives the Board authority to conduct law and motion practice as part of the pre-hearing conference.
- Promulgate regulations which change references to “executive director” from “secretary” and to “administrative law judge” from “hearing officer” to reflect the current organizational structure and duties of the Board staff and administration. The regulations were effective on December 31, 2003.

As noted, all of the legislative and regulatory changes have been approved and are effective. The Board’s internal procedures, policies, and publications have been updated to incorporate the above changes.

13. The Board has not adopted an Administrative Enforcement Manual.

A Guide to the New Motor Vehicle Board was published in July 1997 and revised in April 1999. The Guide functions like a practice manual for attorneys appearing before the Board. It contains the Administrative Procedure Act, as well as, the applicable Vehicle Code and regulatory sections. Annually, the Board revises its Guide to incorporate all statutory and regulatory changes. Most recently, the Guide was updated in February 2010. The *Guide* was recently updated and approved by the Board at its April 9, 2014, General Meeting.

14. The Board should ensure that all required transaction reports are filed with the Agency.

The DMV has taken steps to ensure that the Board is provided all necessary information to file the necessary transaction reports. Senior Staff Counsel is in contact with Agency counsel concerning the Board’s court cases. Agency is also provided with a Bi-weekly Report containing significant issues that may be of interest to the administration.

15. Board delegations are not formalized.

The Budget and Finance Committee presented recommendations concerning Board delegations which were adopted at the March 18, 1997, General meeting. The Committee considered all of the duties of the Board and staff, and recognized those

that, by statute or regulation, are retained by the Board or are already delegated to designated individuals. In addition, the Committee report recommended which administrative duties should be delegated to staff and the level of Board oversight over these activities. The recommendations also contained an indication as to transaction type and dollar limit for procurement of goods and services, where applicable. The Board's internal procedures are consistent with the policy developed by the Budget and Finance Committee. At the May 26, 2011, General Meeting the annual review of these delegations was made an exception report.

16. The Board should consider distribution of assignments.

At the July 1996, General meeting, the Judicial Policies and Procedures, and Budget and Finance Committees were established. At its May 25, 2000, General meeting, the members adopted the Audit Review Committee's proposal to consolidate the existing 10 advisory committees into the following committees: (1) Administration Committee; (2) Policy and Procedure Committee; (3) Board Development Committee; and, (4) Executive Committee. At the September 12, 2000, General meeting, the members adopted the Executive Committee's recommendation of splitting off the budget and finance functions currently assigned to the Administration Committee and created a Fiscal Committee. At the December 5, 2002, Special meeting, the Government and Industry Affairs Committee was created. At the April 21, 2005, General meeting, a Search Committee was created on an ad hoc basis for purposes of filling the Executive Director vacancy upon Tom Novi's retirement. Annually, the Board President at the first General meeting of the year reviews these committee designations after the election of officers. Most recently, these committee designations were revised at the February 4, 2014, General meeting.

17. The Board should adopt an audit resolution policy.

The Board adopted an audit resolution policy and submitted a Corrective Action Plan ("CAP") in response to the audit. Board members and staff were actively involved in the development of the CAP.

18. The New Motor Vehicle Board does not have an adequate audit trail to account for all fees paid to the Board.

The Budget and Finance Committee adopted a policy that addresses this finding at its November 1996, Committee meeting. The Board then adopted the Corrective Action Plan Report in which this policy was encompassed at its February 12, 1997, General meeting. The Board's internal procedures are consistent with the policy developed by the Budget and Finance Committee.

19. Travel Expenses for out of state trips were not approved by the Board.

At the July 12, 1996, General meeting, the Board adopted a policy to ensure that Board members are fully apprised of and actually approve the budgetary allotment for and participation in any out-of-state travel. This topic is agendaized annually for Board

member consideration, and was recently affirmed and ratified at the February 4, 2014, General meeting. If travel restrictions are eased for fiscal year 2014-2015, staff will submit the requests to the Department of Motor Vehicles, the California State Transportation Agency, the Department of Finance and the Governor's office for final approval. Once final administration approval is received, the Executive Committee will authorize which individuals will actually attend. This final approval will be agendaized for the first half of the fiscal year at a regularly scheduled Board meeting.

20. Public funds cannot be used for legal work to represent for-profit corporations where the state is not a party to the action.

The Board instituted a policy that requires the Board President and Agency approval, as necessary. See Audit Finding 4 for a discussion of the Board policy implemented for filing of amicus curiae briefs.

21. Exempt position time reporting is not in compliance with state requirements.

From 1996 to April 2000, attendance sheets were submitted for the exempt position. In May 2000, the Board agreed to loan its statutory exempt entitlement to then DMV Director, Steven Gourley, for a period of time. At the December 11, 2003, Special meeting, then DMV Director Chon Gutierrez informed the Board that it no longer needed the Board's exempt entitlement. By motion and unanimous vote, the Board's exempt entitlement is being used for the Executive Director position effective January 1, 2004. All Board staff, including the Executive Director, report their time to the DMV in compliance with State requirements.

22. The Board does not have an Information Security Officer (ISO).

At the August 20, 1996, General meeting, the Board designated then Assistant Executive Secretary, Michael Sieving, to serve as Information Security Officer. When Tom Novi was appointed to the position of Assistant Executive Secretary and ultimately the Executive Director, Mr. Novi assumed these duties. When Mr. Novi retired and Mr. Brennan was appointed, he assumed these duties.

23. Inventory tags have not been attached to state equipment.

Inventory tags have been attached to all required equipment. New equipment receives the appropriate inventory decals as prescribed. The DMV maintains the property tag numbers on an equipment inventory list.

24. The computer system needs additional physical security devices.

The Board staff has installed the required smoke detectors in the computer room, and has a plastic tarp available to cover the network server, if necessary. The smoke detectors and tarps are still operational.

24(25).⁴ Virus protection procedures need improvement.

Anti virus software has been installed on the LAN server and on all PCs and laptops. The software is updated regularly by DMV's Information Systems Division (DMV/ISD).

25(26). Password protection is inadequate or not operational.

The Board's LAN servers and PCs are monitored and maintained by DMV/ISD. Passwords are required to be changed every 45 days.

26(27). Data processing system documentation could be strengthened.

Configurations of the LAN server are documented in numerous procedural manuals which are maintained by DMV/ISD. Software installation and data back up are strictly controlled.

27(28). Higher-level security access control is inadequate.

Security access to the Board's LAN server is controlled by DMV/ISD. No Board employees have access to the server. A limited number of Board employees have administrative access to the Board's PCs and laptops.

28(29). Designation of economic conflict-of-interest filing officials is incomplete.

In August 1996, the Fair Political Practices Commission (FPPC) staff advised the Board that statements of economic interests for the Assistant Executive Secretary and the Hearing Officers should be retained internally. Due to the restructuring of the Board's senior management, the Conflict of Interest Code was revised in accordance with the procedure established by the FPPC and the Office of Administrative Law. At the November 20, 2001, General meeting, the members approved the revised text of proposed revisions to the Conflict of Interest Code that incorporated suggestions from the Fair Political Practices Commission. Rulemaking implementing these changes was effective on February 17, 2002. The Conflict of Interest Code was recently updated and effective August 23, 2013.

29(30). The Board should promptly cause the investigation of suspected irregular activities.

The Board staff complies with all DMV policies concerning reporting and investigating suspected irregular activities.

⁴ Due to a typographical error, the Performance Audit contained two separate audit findings numbered "Finding 24." The Board's Corrective Action Plan did not note this and numbered the findings sequentially, resulting in the numbers above enclosed in parentheses.

30(31). Board staff does not have access to written guidance on appropriate behavior.

Board staff is provided with all materials disseminated by the DMV with regard to inappropriate behavior.

31(32). The Board has not purged computer records.

The Board staff retains mediation records on the LAN for three-years. After three years, data is removed from the LAN and stored on CD ROM. With regards to the Legal Division, computer records are archived to a CD ROM on an as needed basis.

If you have any questions or require additional information, please do not hesitate to contact me at (916) 324-6197 or Robin at (916) 323-1536.

Enclosure